

## Scott B. Birkey

PARTNER

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### Overview

Scott is a land use and natural resources lawyer who handles entitlement, compliance, and litigation matters for residential and commercial developers, educational and health-care institutions, and public agencies throughout California.

### Land Use Entitlements And Permits Experience

Scott has successfully represented developers in obtaining all forms of land use entitlements, including securing development agreements, vesting and tentative maps, general plan amendments, rezonings, site development permits, and other land use approvals. His clients include urban infill developers, master-planned community developers, affordable housing developers, renewable energy developers, and educational and health-care institutions, typically in connection with multiple and complex land use entitlements and, in many instances, involving local, state, and federal agencies. Scott has also assisted clients with land use due diligence in connection with purchases and sales of property.

### Endangered Species And Wetlands Permitting Experience

Scott is a leading authority on obtaining permits and approvals under the federal and state Endangered Species Acts, Section 404 of the Clean Water Act, Section 1603 of the California Fish and Game Code (streambed alteration agreements), and the Porter-Cologne Water Quality Control Act (water quality certifications and waste discharge requirements). Scott has extensive experience advising clients as to

#### Practice Areas

Land Use  
Litigation & Counseling  
Land Use Disputes  
Real Estate  
Master-Planned Development  
Natural Resource Permitting and Conservation

#### Industries

Energy & Renewable Energy  
Healthcare & Seniors Housing  
Hospitality

#### Real Estate Sectors

Residential, Mixed-Use  
Development & Homebuilding

conservation easements and other similar approaches to mitigation to satisfy permit obligations, and has participated in the review and preparation of large-scale habitat conservation plans and natural community conservation plans on behalf of both private developers and public agencies. Scott regularly prepares and reviews environmental documents in accordance with the California Environmental Quality Act, the National Environmental Policy Act, and Section 404 of the Clean Water Act. Scott is co-author of Natural Resource Regulation in California published by Solano Press, the leading treatise in California on permitting projects under the federal and state Endangered Species Act, Section 404 of the Clean Water Act, and other statutory regimes regulating the incidental take of special-status species and the fill of wetlands.

## Land Use And Natural Resources Litigation Experience

Scott defends project approvals on behalf of residential and commercial developers and public agencies in both state and federal courts. His litigation matters involve challenges to project approvals brought under the California Environmental Quality Act, the National Environmental Policy Act, the Clean Water Act, the Endangered Species Act, and a variety of California planning and zoning laws. Scott also represents clients in enforcement actions brought by the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, Regional Water Quality Control Boards, and the California Department of Fish and Wildlife.

## Bar & Court Admissions

State Bar of California

U.S. Court of Appeals for the Ninth Circuit

U.S. District Court for the Central, Northern, and Eastern Districts of California

## Education

J.D., University of California, Berkeley School of Law, 2000

M.S., University of Idaho, 1997

B.A., Texas State University, 1994

## Experience

Represented a homebuilder in litigation filed under the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act relative to an 80-acre residential development within a specific plan area in Sacramento County.

Represented an academic institution in litigation filed under the California Environmental Quality Act related to campus development on an approximately 200 acre project site within a larger long-range development plan.

Assisted a development partnership with obtaining a General Plan Amendment, Rezoning, and a Use Permit for a 300-acre master planned community project in Butte County. Project involved review of an Environmental Impact Report under the California Environmental Quality Act.

Advised a developer regarding redevelopment of infill project site in the City of San Jose and involved General Plan and Specific Plan Amendments. Project involved review of an Environmental Impact Report under the California Environmental Quality Act.

Advised a water company in Sacramento Valley regarding a "consistency determination" under the California Endangered Species Act and Section 7 of the Endangered Species Act for installation of fish screens and other water conveyance infrastructure.

Advised a renewable energy company regarding acquisition and compliance with Endangered Species Act incidental take permit, streambed alteration agreement, and waste discharge requirements for a 150 MW wind energy facility in Kern County.

Assisted a hospital in the City of Oakland with obtaining multiple land use entitlements related to Master Plan required for seismic upgrades. Project involved review of an Environmental Impact Report under the California Environmental Quality Act.

Advised an affordable housing developer in connection with land use entitlements for new and refurbished apartments in the City of East Palo Alto. Project involved review of a Mitigated Negative Declaration under the California Environmental Act and an Environmental Assessment under the National Environmental Policy Act.

Assisted a lender with land use due diligence on a 150-acre project site in the City of San Francisco with reviewing multiple and complex entitlements.

Assisted a renewable energy company with land use diligence involving financing for multiple renewable energy project sites in Riverside County.

Assisted a development partnership with obtaining a Section 404 Clean Water Act permit, Endangered Species Act Section 7 Biological Opinion, Streambed Alteration Agreement, Section 401 Water Quality Certificate, and Section 2081 California Endangered Species Act Incidental Take Permit for a 300-acre master planned community project in Butte County.

Advised a university with obtaining Section 404 Clean Water Act permit and associated National Environmental Policy Act review in Merced County.

Represented a company in connection with defense against challenge to Endangered Species Act Section 10 Incidental Take Permit/Habitat Conservation Plan and Endangered Species Act Section 7 Biological Opinion.

Represented a municipal government with defending California Environmental Quality Act challenge brought against port expansion project.

## Insights

### News

Forty-Four Cox, Castle & Nicholson LLP Lawyers Recognized as Best Lawyers® Award Recipients  
Press Release, *Best Lawyers*, 8.17.23

Nine Attorneys Named Northern California Super Lawyers  
Press Release, *Super Lawyers*, 6.27.23

Forty-One Cox Castle Lawyers Named to 2023 Best Lawyers® List  
Press Release, *Best Lawyers*, 8.18.22

Thirty-Four Attorneys Named 2022 California Super Lawyers  
Press Release, *Super Lawyers*, 8.1.22

35 Cox, Castle & Nicholson LLP Lawyers Named to 2022 Best Lawyers® list  
Press Release, *Best Lawyers®*, 8.19.21

Nine Attorneys Named Northern California Super Lawyers  
Press Release, *Super Lawyers*, 7.7.21

32 Cox, Castle & Nicholson LLP Lawyers Named to 2021 Best Lawyers® list  
Press Release, *Best Lawyers®*, 8.21.20

Fourteen Attorneys Named Northern California Super Lawyers  
Press Release, *Super Lawyers*, 7.1.20

Scott Birkey and Clark Morrison Interview In GlobeSt. Article - Why Waters Regs Matter To Developers  
News, *GlobeSt.com*, 2.28.20

Twenty-Nine Cox, Castle & Nicholson Attorneys Have Been Selected for the 2020 Edition of The Best Lawyers in America®.

Press Release,

The Best Lawyers in America®, 8.16.19

Fourteen Cox, Castle & Nicholson Attorneys Recognized As 2019 Northern California Super Lawyers & Rising Stars  
Press Release, *Super Lawyers*, 7.15.19

Twenty-Six Cox, Castle & Nicholson Attorneys Have Been Selected for the 2019 Edition of The Best Lawyers in America®.  
Press Release,

The Best Lawyers in America®, 8.15.18

Fifteen Cox, Castle & Nicholson Attorneys Recognized As 2018 Northern California Super Lawyers & Rising Stars  
Press Release, *Northern California Super Lawyers*, 7.13.18

Scott Birkey Featured In GlobeSt. Q&A - Changes Coming To Wetland Regulations  
News, *GlobeSt.*, 9.8.17

Twenty-Three Cox, Castle & Nicholson Attorneys Have Been Selected for the 2018 edition of The Best Lawyers in America®.  
Press Release, *The Best Lawyers in America®*, 8.15.17

Ten Cox, Castle & Nicholson Attorneys Recognized As 2017 Northern California Super Lawyers & Rising Stars  
Press Release, *Northern California Super Lawyers*, 7.7.17

Eleven Cox, Castle & Nicholson Attorneys Recognized As 2017 Northern California Super Lawyers & Rising Stars  
Press Release, 7.7.17

Scott Birkey and Clark Morrison Quoted in Law360 - Calif. Bracing For Potential EPA, Clean Water Act Changes  
News, *Law360*, 1.12.17

Eleven Cox, Castle & Nicholson Attorneys Recognized As 2016 Northern California Super Lawyers & Rising Stars  
Press Release, *Northern California Super Lawyers*, 7.8.16

11 Cox Castle Attorneys Named 2015 Northern California Super Lawyers  
News, *Super Lawyers*, 7.7.15

Feds Argue Against Nixing Permits In Calif. Logging Row  
News, *Law360*, 5.4.15

41 Cox, Castle & Nicholson Attorneys Recognized As 2014 Super Lawyers  
Press Release, 7.17.14

Nine San Francisco Attorneys Listed For 2013 Top 100 Attorneys In Northern California  
Press Release, *Super Lawyers*, 7.1.13

Cox, Castle & Nicholson LLP Attorneys Are Recognized As 2010 Northern California Super Lawyers Rising Stars  
Press Release, *Super Lawyers*, 8.1.10

Mitigating Impacts on California Listed Species Habitat  
News, *Law360.com*, 5.8.09

## Speaking Engagements

California Land Use Law, Policy, and Planning Conference 2022  
Webinar, Online, 12.7.22

The Seminar Group's California's Changing Coastal and Shoreline Management Conference  
Webinar, 01/21/2021-01/22/2021

6th Annual California Land Use Law & Policy Conference  
Webinar, 11.20.20

Changing Tides: Wetlands Permitting Rules & Regulations Under State and Federal Law  
Webinar, 4.6.20

2019 Environmental Law Conference at Yosemite  
Sponsorship, Tenaya Lodge at Yosemite, Fish Camp, CA, 10/17/2019-10/20/2019

The Seminar Group's Shoreline and Coastal Management Conference  
Conference, Oakland Marriott City Center, Oakland, CA, 09/26/19-09/27/19

UCSF Benioff 20th Annual Score For Kids Golf Classic  
Sponsorship, Claremont Country Club, Oakland, CA, 9.16.19

Bay Planning Coalition Spring Summit  
Sponsorship, Mariners' Memorial Club and Hotel , San Francisco, CA, 5.10.19

AEP Navigating Wetland Permitting Strategies  
Conference, San Francisco, CA, 4.23.19

5th Annual California Land Use Law & Policy Conference  
Conference, Omni Hotel, Los Angeles, CA, 3.18.19

The Politics of Land Use: Wetlands 101  
Conference, 100 Spectrum Center Drive, Irvine, CA, 3.7.19

2018 California Water Law & Policy MCLE Conference: Water Projects, Rights and Management in the Era of Changing  
Supply  
Conference, Omni Hotel, San Francisco, CA, 06/11/2018-06/12/2018

2018 California Land Use Law & Policy Conference  
Conference, Omni Hotel, Los Angeles, CA, 3.5.18

AEP's Navigating the Legal and Political Pitfalls of Ballot Box Land Use Planning: What Lawyers, Planners, and  
Consultants Should Know  
Seminar, United Way Room, San Francisco, CA, 2.21.18

2017 California Water Law & Policy MCLE Conference: Coping with Drought, Floods and the New Federal  
Administration  
Conference, Hotel Nikko, San Francisco, CA, 06/12/2017-06/13/2017

BPC Expert Briefing: Emerging Environmental Risks for the San Francisco Bay  
Conference, Marsh Risk & Insurance Services, San Francisco, CA, 3.30.17

Environmental Law Basics: Understanding CEQA  
Conference, BASF Conference Center, San Francisco, CA, 11.3.16

2016 California Land Use Law & Policy Conference  
Conference, DoubleTree Suites, Santa Monica, California, 9.12.16

2016 AEP Conference  
Conference, Sheraton San Diego Hotel and Marina - Bay Tower, San Diego, California, 4.4.16

AEP - The Governor Speaks . . . And Then What? Figuring Out The Role Of Executive Orders For Development And In  
CEQA Documents  
Conference, San Francisco, CA, 10.28.15

2015 California Water Law & Policy MCLE Conference  
Conference, Hotel Nikko, San Francisco, CA, 6.15.15

County Counsels' Association - Spring 2014 Land Use Conference  
4.30.15

2030 and Beyond: The Next Phase of Greenhouse Gas Reduction in California  
Sponsorship, Elihu Harris Building, Oakland, California, 4.16.15

2015 California Land Use Law & Policy Conference  
Conference, Westin Hotel - Sacramento, CA, 3.9.15

Environmental Law Conference at Yosemite  
Conference, Tenaya Lodge, Yosemite, California, 10.16.14

California Water Law And Policy Conference  
Conference, Hotel Nikko, San Francisco, California, 6.19.14

California Land Use Law & Policy  
Conference, Hyatt Regency Hotel, 1.9.14

Climate Change: California's Efforts To Reduce Greenhouse Gas Emissions Through Renewables, Fuels, And Markets  
Conference, Booth Auditorium, UC Berkeley School of Law, 11.14.13

UCI First Annual Emerging Issues In Environmental Law Policy And Practice Symposium  
Conference, UC Irvine School of Law, Irvine, California, 10.3.13

2013 California County Counsels' Association Land Use Conference  
Conference, The Cliff's Resort, Pismo Beach, California, 5.2.13

California Water Law & Policy Conference  
"California Water 2013: Negotiating the Legal and Regulatory Changes Affecting Water Use"  
Conference, Hotel Nikko, San Francisco, CA, 4.22.13

Wetlands and Land Use Update  
California Water & Law Policy Conference  
Conference, San Francisco, California, 4.20.12

Resources Update: Wetlands and Endangered Species  
California County Counsels' Association Land Use Section  
Conference, Palm Springs, California, 5.7.10

The New Water Legislation and Land Use Issues, Impacts on Urban Water Management Plans  
2010 California Water Law & Policy MCLE Conference  
Conference, San Francisco, California, 4.22.10

Resources Update: Wetlands and Endangered Species  
Land Use Spring 2009 Study Section Conference  
Conference, Shell Beach, California, 5.8.09

The Supplemental EIS - When to Prepare It; Scope and Substance; Standard of Review  
3.29.07

## Publications

Governor Signs Legislation Enacting Significant Amendments to SB 35, Increasing Opportunities for Development of Multi-Family Housing (Part III)  
Client Alert, 11.28.23

Governor Signs Legislation Enacting Significant Amendments to SB 35, Increasing Opportunities for Development of Multi-Family Housing (Part II)  
Client Alert, 11.21.23

Governor Signs Legislation Enacting Significant Amendments to SB 35, Increasing Opportunities for Development of Multi-Family Housing (Part I)  
Client Alert, 11.17.23

Governor Signs Long-Awaited Affordable Housing on Faith and Higher Education Lands Act of 2023  
Client Alert, 10.19.23

Governor Signs Legislation Allowing For Permits To Take Fully Protected Species  
Client Alert, 8.1.23



What Every Developer Should Know About the Builder's Remedy  
Client Alert, 4.18.23

New Legislation Expands Campaign Contribution Laws to Include Local Elected Officials - Contributions May Now Require Elected Officials to Recuse Themselves from Voting on Projects  
Client Alert, 10.17.22

Governor Signs Important New Housing Legislation Allowing Residential Development on Commercial Properties  
Client Alert, 10.3.22

Going To The Well: State Imposes More Stringent New Well Permitting Requirements  
Client Alert, 7.13.22

What's All the Buzz About? Bees and Other Terrestrial Invertebrates Now Eligible for California Endangered Species Act Listing  
Client Alert, 6.3.22

Court Clarifies CEQA Cumulative Water Supply Impact Analysis Requirements  
Client Alert, 2.22.22

New WOTUS Definition Coming Soon: Army Corps of Engineers and EPA Announce Proposed Rule Defining Waters of the United States under the Clean Water Act  
Client Alert, 11.24.21

Changes Are On The Horizon For Federal Natural Resource Agency Regulations  
Client Alert, 11.9.21

The Legislature Gives the SB 35 Streamlined and Ministerial Approval Process a Boost  
Client Alert, 10.13.21

Governor Newsom Signs Newsworthy Housing Legislation Addressing State's Housing Supply Crisis  
Client Alert, 9.20.21

Army Corps Issues Final Rule on New and Reissued Nationwide Permits  
Client Alert, 1.19.21

New State Housing Supply Legislation on the Horizon: Déjà Vu All Over Again?  
Client Alert, 1.8.21

Second Court Weighs in on Water Board Powers – This Time Expanding the Scope of Water Board Wetland Permitting Authority  
Client Alert, 1.5.21

Court Rules Against California's Wetlands Regulatory Program  
Client Alert, 12.21.20

2020 Housing Legislation Summary  
Client Alert, 11.4.20

Joshua Trees Receive Emergency Endangered Species Protection  
Client Alert, 9.23.20

Is it a Crime to Kill a Mockingbird? Federal Court weighs in on the Migratory Bird Treaty Act.  
Client Alert, 8.19.20

Santa Clara County Trial Court Upholds Two Housing Projects Using SB 35  
Article, *CEB*, 7.30.20

CEQA Considerations When Evaluating Impacts to Biological Resources  
Article, *California Land Use Law & Policy Report*, 7.8.20

Court Narrows Ruling Regarding Nationwide Permit for Utility Crossings to Oil and Gas Pipelines  
Client Alert, 5.15.20

Supreme Court Rules that Discharges to Groundwater May Be Regulated by Clean Water Act  
Client Alert, 4.23.20

Court Eliminates Army Corps Nationwide Permit for Utility Crossings  
Client Alert, 4.20.20

What Environmental and Real Estate Practitioners Need to Know About the Navigable Waters Protection Rule  
Article, *California Environmental Law Reporter*, 4.1.20

Insight: Trump's Clean Water Act Rollback - Implication For California  
Article, *Bloomberg Law*, 2.27.20

Trump Administration Dramatically Narrows Scope of Federal Wetlands Protections  
Client Alert, 1.23.20

New Endangered Species Act Regulations on the Horizon  
Client Alert, 8.16.19

Trump Administration Regulatory Reforms Federal Natural Resource Law  
Article, *Cox, Castle & Nicholson*, 8.22.18

Takeaways From California Land Use Conference  
Article, *Daily Journal*, 3.29.18

The Trump Effect on California's Wetland Regulations  
Article, *Law360*, 7.31.17

New Sacramento-San Joaquin River Delta Plan Takes Effect

Client Alert, *CCN Client Alert*, 9.4.13

Challenges to Permitting Desalination Plants in California

Article, *California Land Use Law & Policy Reporter*, March 2013

Fourth District Upholds Lead Agency's Decision Not to Prepare Subsequent CEQA Analysis for a Project Initially Evaluated in a Negative Declaration

Article, *California Land Use Law & Policy Reporter*, June 2012

Second District Upholds Use of Future Projected Conditions As Baseline For Environmental Analysis of a Light Rail Project

Article, *California Land Use Law & Policy Reporter*, June 2012

First Quarter CEQA Case Law Update

Client Alert, *CCN Quarterly CEQA Case Law Update*, May 2012

U.S. Fish and Wildlife Service Issues Final Land-Based Wind Energy Guidelines

Client Alert, *CCN Client Alert*, 4.6.12

U.S. Supreme Court Rules That a Clean Water Act Compliance Order Can Now Be Challenged in Court

Client Alert, *CCN Client Alert*, 3.22.12

The Army Corps of Engineers Issues New Procedures for Determining Wetland Fill Permit Mitigation Ratios

Client Alert, *CCN Client Alert*, 3.1.12

2011 Fourth Quarter CEQA Case Law Update

Client Alert, *CCN Quarterly CEQA Case Law Update*, February 2012

EPA and Army Corps of Engineers Issue Proposed Guidance That Would Expand Their Jurisdiction Under the Clean Water Act

Client Alert, *CCN Client Alert*, 5.6.11

Ninth Circuit Allows Project Applicants to Defend Their Projects Against NEPA Lawsuits

Client Alert, *CCN Client Alert*, 1.14.11

New Guidance Issued on Categorical Exclusions for Streamlined NEPA Review

Client Alert, *CCN Client Alert*, 11.29.10

Take of Endangered Plants in Privately-Owned Wetlands Not Prohibited Under Endangered Species Act

Client Alert, *CCN Client Alert*, 8.27.10

A Breath Of Fresh Air - Federal Court Rejects Lawsuit Against Wetlands Fill Permit

Client Alert, *CCN Client Alert*, 6.3.10

State and Federal Wildlife Agencies Struggle over California's Listing of California Tiger Salamander  
Client Alert, *CCN Client Alert*, 5.6.10

California Supreme Court Rejects Attempts to Undermine CEQA's Statue of Limitations  
Client Alert, April 2010

California Supreme Court Rejects Attempts To Undermine CEQA's Statute of Limitations  
Client Alert, *CCN Client Alert*, April 2010

A Brave New World for Land Use Regulation in the Delta and Along the San Francisco Bay Shoreline  
Article, *California Land Use Law and Policy Reporter*, March 2010

It's Not Just About Water: Land Use and Other Provisions in the California Delta Water Bills  
Client Alert, *CCN Client Alert*, 11.5.09

Incidental Take Authorized for Projects Benefiting Species and Their Habitat  
Client Alert, *CCN Client Alert*, 10.14.09

Court Expands Corps' Jurisdiction Over Some Seaside Activity  
Client Alert, *CCN Client Alert*, 10.13.09

2009 Third Quarter CEQA Case Law Update  
Client Alert, *CCN Quarterly CEQA Case Law Update*, October 2009

UC Merced Receives Wetlands Permit for Campus and University Community  
Client Alert, *CCN Client Alert*, 5.14.09

Obama Withdraws Bush-Era Endangered Species Regulation  
Client Alert, *CCN Client Alert*, 5.4.09

Ninth Circuit Provides Guidance on Triggers for Environmental Impact Statements  
Client Alert, *CCN Client Alert*, 4.30.09

Winter Quarter 2009 CEQA Case Law Update  
Client Alert, *CCN Quarterly CEQA Case Law Update*, Winter 2009

Court Of Appeal Issues Decision In Sunrise Douglas Litigation  
Client Alert, *CCN Client Alert*, 3.26.09

The Services Issue Final Rule Amending Section 7 Consultation Regulations  
Client Alert, *CCN Client Alert*, 12.12.08

EPA And Army Corps Of Engineers Issue Revised Wetlands Guidance  
Client Alert, *CCN Client Alert*, 12.4.08

Floating A New Boat on the Jurisdictional Waters - Army Corps of Engineers and EPA Issue Rapanos Guidance Article, Aug-Sept 2007

EPA and Army Corps of Engineers Issue Rapanos Guidance Client Alert, 06.06.07

## **Awards & Affiliations**

### **Honors & Recognitions**

*Best Lawyers*, Land Use & Zoning Law, 2018 -2021

Northern California Super Lawyers, 2010; 2013-2021

### **Professional Affiliations**

State Bar of California

Member, State Bar of California, Environmental Legislation Committee

Editor, California Land Use Law and Policy Reporter

Member, Association of California Water Agencies

Member, Bay Planning Coalition

President, Ecology Law Research Institute, Inc.